

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

VAN WELL NURSERY, INC., a  
Washington Corp., HILLTOP  
FRUIT TREES, LLC,

Plaintiffs,

v.

MONY LIFE INSURANCE COMPANY,  
a New York corporation; A/B  
HOP FARMS, INC., a Washington  
corporation; BENNETT G.  
BRULOTTE and TRACY A  
BRULOTTE, individually and  
their marital community;  
WALLA WALLA PARCEL NO. 31-07-  
23-11-00-02

Defendants.

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MONY LIFE INS. CO., a N.Y.  
corp.,

Third-Party Plaintiff,

NATIONAL LICENSING ASSOC.,  
LLC., a Washington limited  
liability company (f/k/a  
Nursery Licensing  
Association, LLC),

Third-Party Defendant.

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NO. CV-04-0245-LRS

**ORDER GRANTING MONY LIFE'S  
MOTION FOR RECONSIDERATION**

**BEFORE THE COURT** is Defendant and Third-Party Plaintiff Mony Life's Motion for Reconsideration (Ct. Rec. 124) of the Court's March 22, 2006 Order Dismissing Mony Life's Third Party Complaint and Denying Mony's Motion to Compel. Oral argument was held on this matter on April 14, 2006. Scott Bruns appeared on the Plaintiff's behalf and David Hunter and Paul Swanson appeared on behalf of the Defendants. After careful review of the pleadings submitted by all parties and with the benefit of oral argument, this order will memorialize and supplement the oral rulings of the Court, which are incorporated herewith. For the foregoing reasons, Mony Life's Motion for Reconsideration of the Order Dismissing the Third Party Claims against NLA is **GRANTED**, and its Reconsideration of the Motion to Compel is **GRANTED IN PART**.

## BACKGROUND

On July 9, 2004, plaintiffs filed this action for plant patent and trademark infringement, as well as false designation of origin, counterfeiting, unfair competition, and Washington Consumer Protection Act claims. On September 23, 2004, Mony Life answered the complaint asserting various defenses, affirmative defenses, counterclaims, and a third party complaint against National Licensing Association (NLA). On January 24, 2005, the plaintiff's patent infringement claims asserted against Mony Life were dismissed by entry of summary judgment. On March 16, 2006, the Court granted a second motion for summary judgment dismissing all remaining claims asserted against Mony Life and granting a majority of the relief sought in Mony Life's first three counterclaims. On March 22, 2006, the Court dismissed Mony Life's third party claims against NLA and denied Mony Life's motion to compel.

1 Mony Life's remaining counterclaims include:

- 2 1. "Inequitable, improper and impermissible" use of United States  
3 patents and trademark. Mony Life's Counterclaim ¶ 4.
- 4 2. Unfair business practices pursuant to RCW 19.86.020. Mony Life's  
5 Counterclaim ¶ 5.
- 6 3. Improper and illegal restraint of trade or commerce pursuant to RCW  
7 19.86.030 and 15 U.S.C. § 1. Mony Life's Counterclaim ¶ 6.

8 In addition, Mony Life has pleaded the following third party claims  
9 against NLA:

- 10 1. Unfair business practices under the Washington Unfair Business  
11 Practices/Consumer Protection Act. Mony Life's Third Party Claims  
12 ¶¶ 1-5.
- 13 2. Improper and illegal restraint of trade or commerce pursuant to RCW  
14 19.86.030 and 15 U.S.C. § 1. Mony Life's Third Party Claims ¶ 6.

#### 15 DISCUSSION

16 Defendant Mony Life seeks an order reinstating its counterclaims  
17 against NLA, and compelling the NLA to produce documents, to answer  
18 interrogatories, to order the resumption of the 30(b)(6) deposition of  
19 the NLA. When a district court considers a motion to compel, it must  
20 evaluate such factors as timeliness, good cause, utility, and  
21 materiality. *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996).

22 With these factors in mind, the Court **GRANTS THE MOTION IN PART.**

23 In denying the motion to compel NLA to produce documents and to  
24 answer interrogatories, as stated on the record, the Court considered the  
25 troublesome timing of the motion. The scheduling order entered on  
26 December 6, 2004 required that all discovery be concluded by November 14,

1 2005. All dispositive motions were due on or before November 21, 2005.  
2 Despite Mony Life's having maintained the same defenses, counterclaims,  
3 and third party claims in two successive litigations (this case and cause  
4 number 02-CV-5077-LRS), for reasons unknown to the Court, the NLA  
5 30(b)(6) deposition *began on November 14, 2005*. In addition, Mony Life's  
6 *first* requests for production and *first* set of interrogatories to the NLA  
7 were served on *October 12* and *October 13, 2005* respectively, making NLA's  
8 responses due on the discovery cut off. Fed.R.Civ.P. 33(b)(3), 34(b).  
9 The timing of Mony Life's pursuit of discovery left Mony Life,  
10 dissatisfied with the NLA's discovery responses, with no option but to  
11 file its motion to compel after the discovery deadline had expired. In  
12 fact it was filed nearly one month later. Mony Life has offered no  
13 reason to justify its last-minute discovery in this case, only noting  
14 that the federal rules technically permit a party to conduct discovery  
15 in any sequence. *Mony Life's Reply in Support of Motion to Compel*, Ct.  
16 Rec. 111 at 7. In addition, given the broad sweeping nature of its  
17 discovery requests, Mony Life could have and should have anticipated  
18 discovery complications. Finally, there were no motions or requests for  
19 extension of the time for discovery.

20 Accordingly,

21 **IT IS HEREBY ORDERED:**

22 1. Mony Life's Motion for Reconsideration is **GRANTED** to the extent  
23 that it deals with counterclaims against NLA, which Mony originally filed  
24 against NLA in the previously dismissed action, (cause number 02-CV-5077-  
25 LRS). The Court ruled that those counterclaims could be consolidated with  
26 this case through the use of third party pleading procedure.

